

AFTER BALI: WTO RULES  
APPLYING TO  
PUBLIC FOOD RESERVES






# *After Bali: WTO rules applying to public food reserves*

*by*

Christian Häberli

PhD, Senior Research Fellow, World Trade Institute (WTI), Bern University (Switzerland)\*



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## ABSTRACT

Once more, agriculture threatened to prevent all progress in multilateral trade rule-making at the Ninth WTO Ministerial Conference in December 2013. But this time, the “magic of Bali” worked. After the clock had been stopped mainly because of the food security file, the ministers adopted a comprehensive package of decisions and declarations mainly in respect of development issues. Five are about agriculture. Decision 38 on Public Stockholding for Food Security Purposes contains a “peace clause” which will now be shielding certain stockpile programmes from subsidy complaints in formal litigation.

This article provides contextual background and analyses this decision from a legal perspective. It finds that, at best, Decision 38 provides a starting point for a WTO Work Programme for food security, for review at the Eleventh Ministerial Conference which will probably take place in 2017. At worst, it may unduly widen the limited window for government-financed competition existing under present rules in the WTO Agreement on Agriculture – yet without increasing global food security or even guaranteeing that no subsidy claims will be launched, or entertained, under the WTO dispute settlement mechanism. Hence, the Work Programme should find more coherence between farm support and socio-economic and trade objectives when it comes to stockpiles. This also encompasses a review of the present WTO rules applying to other forms of food reserves and to regional or “virtual” stockpiles. Another “low hanging fruit” would be a decision to exempt food aid purchases from export restrictions.





# 1. INTRODUCTION

Mapping the regulatory framework applying to public food reserves takes place in a politically loaded and economically complex and dynamic context. This article describes the applicable rules and analyses the food security decision taken on 7 December 2013 at the 9<sup>th</sup> WTO Ministerial Conference in Bali. How does this decision affect stockpiles and food security policies in developing countries? The Bali decision also launches a work programme with the mandate to find a way to address conflicting food security concerns throughout the WTO Membership, without unduly increasing trade distortions.

At the outset and before proceeding with a legal analysis, it is necessary to place this exercise in perspective and to recall a number of issues which policy makers and scholars have been grappling with, especially since the last global food crisis (2007–08).<sup>1</sup> Four such national issues with an international dimension may be flagged here.

First, does the equation still hold according to which food can only be produced domestically or imported, with stockpiles as one way of deferred consumption? Are public food reserves a credible and efficient instrument of risk management and price volatility mitigation? Better than producer, processor, trader and household stocks? Economists eager to address excessive price volatility, but uneasy about defining “speculation”, debate whether public stocks and price guarantees really contribute to price stabilisation or, to the contrary, stifle other forms of risk mitigation such as commodity exchanges and producer insurance.

Second, “food security” has different implications, and at times conflicting interests, at the global, national and household levels. This starts with the definition of food security: “when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food.”<sup>2</sup> In my view, this definition is of no value when it comes to the crucial question of how to reach this goal, and of what role to assign to domestic production, foreign direct investment (FDI), international trade and not least, to stockpiles. For the same reason (and unlike for poverty) it is difficult to measure “food insecurity”. Not surprisingly various databases and publications with different criteria produce different results for the same countries.<sup>3</sup> More importantly, none of these measuring attempts considers the negative spill-overs of production policies on food security in other countries. Their authors also differ in their opinions whether public food stocks are an adequate response to market failures, low commercial stocks, and low currency levels.<sup>4</sup> What is clear is that we are far away from a conceptual and useful definition of food security, a set of indicators and a plan of coherent action.

Thirdly, assuming that food security is a public good, government intervention and international cooperation need to be carefully assessed against market-based alternatives, including private stocks

<sup>1</sup> Baris Karapinar and Christian Häberli (Eds), *Food Crises and the WTO*, Cambridge University Press (2010)

<sup>2</sup> FAO, *Rome Declaration on World Food Security* (1996), and *The State of Food Insecurity in the World* (2002)

<sup>3</sup> Three examples:

- FAO (2013) Food Security Indicators (<http://www.fao.org/economic/ess/ess-fs/ess-fadata/en/#.UrLJKndpPK0>)
- Economist Intelligence Unit/DuPont, Global Food Security Index (<http://foodsecurityindex.eiu.com/>)
- Frontier Strategy Group/Syngenta, Ricebowl Index (<http://www.ricebowlindex.com/Pages/default.aspx>)

<sup>4</sup> Cf. FAO, IFAD and WFP, *The State of Food Insecurity in the World 2013. The multiple dimensions of food security*. Rome, FAO (2013). This report discusses various food reserve schemes. It also highlights the difficulties of procurement at market prices while at the same time targeting smallholder farmers.

and other producer and processor risk management tools. Only a few scholarly voices have been raised in this direction.<sup>5</sup> Extensive research on various risk management tools in the Organisation for Economic Co-operation and Development (OECD) shows the complexity of policy formulation in a rapidly globalising food value chain.<sup>6</sup> Efforts by the G20 to combat speculation have not produced tangible results for food price fluctuations. This is perhaps also due to the fact that the international organisations reporting to the G20 have so far avoided clear recommendations for such measures.<sup>7</sup> The painful experience at the international level in the 1980s of international commodity agreements with market intervention mechanisms seems to deter new concerted efforts. Yet there is no dearth of recommendations for such action. Back in 2011, Olivier de Schutter claimed that WTO rules can conflict with food security, because “current green box and domestic support rules are unbalanced: they provide more flexibility to developed country farmers than to developing country farmers.”<sup>8</sup> In his Final Report he reiterates his plea that states should “[L]imit excessive reliance on international trade” and that “[T]he multilateral trade regime as well as regional and bilateral trade agreements must allow countries to develop and implement ambitious food security policies including public food reserves, temporary import restrictions, active marketing boards, and safety net insurance schemes, in support of the progressive realization of the right to food”.<sup>9</sup> Irene Musselli from the United Nations Conference on Trade and Development (UNCTAD) proposes new market stabilisation measures.<sup>10</sup> Carmen G. Gonzalez sees the General Agreement on Tariffs and Trade (GATT) as a colonial construct established at the expense of the global South “protectionism for the wealthy and free markets for the poor”.<sup>11</sup> Surprisingly, even the Doha Round agricultural negotiation chair Crawford Falconer suggested reviving “managed economy” provisions in the last version of his (never adopted) “modalities”.<sup>12</sup>

Fourth and last, for some policy-makers, international non-governmental organisations (NGO) and even scholars, the UN-enshrined *Right to Food* seems to also imply a right to *self-sufficiency* regardless of competitiveness, trade distortions and (domestic) consumer prices.<sup>13</sup> Here the food security debate

<sup>5</sup> Kym Anderson and Will Martin, Trade Distortions and Food Price Surges. World Bank and University of Adelaide, 1 October 2010. Kym Anderson, Will Martin and Signe Nelgen, Export Restrictions and Food Market Instability. Vox, 9 November 2010.

<sup>6</sup> OECD (2013), Global Food Security: Challenges for the Food and Agricultural System. OECD (2011), Managing Risk in Agriculture: Policy Assessment and Design

<sup>7</sup> Price Volatility in Food and Agricultural Markets: Policy Responses. Policy Report including contributions by FAO, IFAD, IMF, OECD, UNCTAD, WFP, the World Bank, the WTO, IFPRI and the UN HLTF. 2 June 2011. Price volatility is identified as one of the main problems, but no response is given on how to deal with “speculators” without stifling markets (cf. paras 27 and 76).

<sup>8</sup> Olivier de Schutter, The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System’. Briefing Note, 4 November 2011.

<sup>9</sup> Report of the Special Rapporteur on the right to food, Olivier De Schutter, Final report: The transformative potential of the right to food. Human Rights Council Document A/HRC/25/57, dated 24 January 2014.

<sup>10</sup> Irène Musselli, La regulation des cours et des marchés des produits de base : vers une nouvelle architecture mondiale ? 139/3 *Journal du Droit International* 903–938 (2012)

<sup>11</sup> Carmen G. Gonzalez, The Global Food Crisis: Law, Policy, and the Elusive Quest for Justice. 13 *Yale Human Rights and Development Law Journal* 462 (2010)

<sup>12</sup> WTO, Committee on Agriculture in Special Session, Revised Draft Modalities for Agriculture. WTO Doc. TN/AG/W/4/Rev.4 (6 December 2008), paras 95–102.

<sup>13</sup> The Bali Decision was welcomed by anti-globalisation NGOs and Indian farm representatives as a victory for self-determination against a developed country attack on the Right to Food. They immediately demanded that the work programme should start with the “original G33 proposal to remove WTO obstacles to Food Security”. Cf. Timothy A. Wise, Right to food wins ‘defensive battle’ in World Trade Organization deal. GlobalPost Blog, 8 December 2013 at 19:39.

goes beyond famine and poverty. In a number of countries the notion of *food sovereignty* has entered a general public discourse, and national legislation. It was coined in 1996 by *Via Campesina* in its fight against trade liberalisation and agro-industrialisation. The declared objectives were self-sufficiency, sustainable production at cost-covering prices for small farmers, protection against cheap imports and the abolition of all export subsidies.<sup>14</sup> Admittedly, as long as border protection and domestic subsidies are constrained by WTO rules and disciplines, policy leeway for more “food sovereignty” (and for the promotion of domestic produce) remains limited.

The question now is whether the Bali decision has implicitly relaxed the multilateral rules in this respect by shielding stockpile management from legal challenges. Is the double spectre of legalised surplus dumping and of competition between finance ministers raising its ugly head again, this time from developing country stockpiles and in the name of poverty mitigation through *food sovereignty*? To me the multilateral trading system looks ill-prepared for the “game changer” announced by Indian Finance Minister Chidambaram when he presented the new Food Security Bill in February 2013.<sup>15</sup> Regardless of Bali, the collapse of the Doha Round in 2008 means that the WTO glass remains half-empty.

- Scheduled maximum *import tariffs* penalising consumers remain high in most countries, even though the applied tariffs may be lower (*tariff overhang*).
- A variety of *subsidy programmes* with trade-distorting effects are still legal. Moreover, governments and, even more, legislators in many countries and in the European Union are again increasing farm protection and trade-distorting support, sometimes under the guise of food safety, food sovereignty, other societal values, or climate change mitigation. This can further weaken the resilience of small farmers in poor developing countries.
- *Export subsidies* have been abolished or at least reduced, but they could be re-increased despite a Bali Ministerial Declaration pledging that “we shall exercise utmost restraint with regard to any recourse to all forms of export subsidies and all export measures with equivalent effect”.<sup>16</sup> Worse, from a global food security viewpoint, all other forms of *export competition* remain basically unrestricted: (i) *food aid* abuse is likely to become even easier after “Doha” because of the so-called “safe box” provision agreed at the WTO Ministerial in Hong Kong.<sup>17</sup> The 2008 “Modalities” propose equally unsatisfactory improvements for the disciplines applying to the other two forms of export promotion, i.e. (ii) subsidised *export credits* and (iii) trade-distorting *export state trading*. Moreover, no new disciplines at all have been proposed for *export prohibitions and restrictions* where multilateral trade rules are virtually absent.<sup>18</sup>

The fact that surplus dumping and export restrictions (and for some countries massive price support and export subsidies) are still allowed inevitably shapes policy making and negotiations: food security by

<sup>14</sup> Annette Aurélie Desmarais, *La Vía Campesina, Globalization and the Power of Peasants*. Halifax, London and Ann Arbor, MI (2007) p.34s.

<sup>15</sup> *in* Express News Service, Sonja-pushed food bill gets additional 10,000 crores. *The New Indian Express*, New Delhi, 1 March 2013.

<sup>16</sup> Export Competition. Ministerial Decision dated 7 December 2013 - WT/MIN(13)/40 - WT/L/915. Document WT/MIN(13)/W/12.

<sup>17</sup> Simone Heri and Christian Häberli, Can the World Trade Organization Ensure that Food Aid is Genuine? 1(1) *Developing World Review on Trade and Competition* 1–70 (Gujarat National Law University, India, 2011)

<sup>18</sup> Christian Häberli, Do WTO Rules Secure or Impair the Right to Food? *in* Melaku Desta and Joe McMahon (eds), *Research Handbook on International Agricultural Trade* (Edward Elgar, Cheltenham/UK and Northampton/US, 2012) pp.70–103, and What’s wrong with WTO rules applying to food security? *in* Rosemary Rayfuse and Nicole Weisfelt (eds), *The Challenge of Food Security*. Edward Elgar (2012) pp.149–167

way of international trade looks good in economic theory but remains a risky proposition for responsible governments, even in essentially open economies. Understandably, stockpiles remain attractive both as a risk management and a social policy tool. Especially when considering even costlier alternatives such as self-sufficiency, many governments allocate scarce resources to food reserves, despite their high cost and inefficiencies, but perhaps also precisely because of their import substitution potential.

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## 2. PRESENT WTO RULES

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Public food reserves are costly, and these costs are hardly ever fully borne by consumers.<sup>19</sup> Financing may come in a variety of forms of government intervention such as taxes, border levies (for imported food), transfer pricing (through levies on other market segments), consumer taxes and foreign food aid. This has different implications for efficiency, impact, and local producer price support or depression. However, only those schemes with producer support and possible trade distortions (including by way of border measures) are considered relevant under a WTO perspective.

Before reviewing the applicable WTO rules it may be recalled here that the long-term objective of the AoA is “to establish a *fair and market-oriented* agricultural trading system [...] through the negotiation of *commitments on support and protection*” and that “commitments [...] should be made in an equitable way among all Members, having regard to non-trade concerns, including *food security* and the need to protect the environment.” The preamble also mentions the “*particular needs and conditions of developing country Members*” – but only in the context of providing greater access to developed country Member markets.<sup>20</sup> For the classification of domestic support measures in the so-called “amber”, “green” and “blue” boxes, there is little difference between developing and developed country measures. Mainly the extent of the reduction commitments differs according to country categories.

AoA - Annex 2 (the *Green Box*, reproduced as Annex 1 to this paper) lists those domestic support measures which may be maintained or introduced by WTO Members without any limits or reduction commitments. In order to qualify for exemption from the reduction commitments, domestic support to food reserves must meet “the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production.” This chapeau condition is an elegant diplomatic formula reflecting the idea that domestic support measures without trade impact are none of WTO’s business. The wording has led many economists to wonder how big “minimal” distortions would have to be before such distortions shift a measure into the *Amber Box*.<sup>21</sup> Moreover, the term has seldom been defined and quantified in dispute resolution.<sup>22</sup> True, developing countries enjoy additional policy space

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<sup>19</sup> An interesting exception is Switzerland where importers of essential foodstuffs are mandated to maintain reserves at the government’s disposal. For various reasons these food reserves are still very large. But operation and maintenance costs are relatively low. They are financed through border levies. This of course affords additional border protection for domestic produce. Yet the scheme is quite efficient, and it is financed not by taxpayers but (rightly so) by the consumers of these foodstuffs.

<sup>20</sup> AoA Preamble (emphasis added).

<sup>21</sup> The *Amber Box* contains all forms of domestic support for agriculture considered to distort trade. It is calculated for each country as its Aggregate Measurement of Support (AMS) and contains both product specific and non-product specific forms of support (see Art.1, 6 and 7 of the AoA). A total of 30 WTO Members had larger subsidies than the *de minimis* levels at the beginning of the post-Uruguay Round reform period, including 17 developing countries which therefore have scheduled limits to their AMS.

<sup>22</sup> Most notoriously in *US – Upland Cotton* (DS 267) where the Appellate Body concurred with the Panel and found that “However one reads the “fundamental requirement” in paragraph 1 of Annex 2, given the factual findings of the Panel, the facts of this case do not present a situation in which the planting flexibility limitations demonstrably have “no, or at most minimal,” trade-distorting effects or effects on production.” (Document WT/DS267/AB/R para 334).

with their *de minimis*-entitlements.<sup>23</sup> On the other hand, the flexibility under the so-called *Developing Country Green Box* in Article 6.2 is in reality so limited that most developing countries cannot make use of this window for “input subsidies generally available to low-income or resource-poor producers in developing country Members”. Some have actually wrongly notified such measures under this provision.

Clearly, domestic subsidies provided by larger economies have a bigger world market price distortion potential than those taken by small ones. In addition to not being more than minimally trade restrictive, all measures qualifying under this chapeau must be “provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers”, and “the support in question shall not have the effect of providing price support to producers.” A number of policy-specific criteria and conditions apply to each such measure. Two are particularly relevant for food reserve financing:

1. Public stockholding for food security purposes (para 3). Such schemes must “form an integral part of a food security programme identified in national legislation”, and be “made at current market prices”. Moreover, “sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question”. A footnote to this paragraph specifies that developing countries have the right to operate such schemes at *administered prices*, but only as long as “the difference between the acquisition price and the external reference price is accounted for in the AMS” (i.e. the *Amber Box*).
2. Domestic food aid (para 4). Sections of the population in need shall be eligible for food aid not subject to WTO limitations or reduction commitments, “either at market or at subsidized prices” but only under programmes establishing “clearly-defined criteria related to nutritional objectives”. Another footnote specifies that “the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.”

All other forms of support to public food reserves (as well as purchases above and sales below market prices) have to be accounted for in the *Amber Box*. This means they are quantitatively limited but not prohibited. The wording in these paragraphs appears somewhat outdated, and the ceilings in some countries’ AMS with high inflation rates are in reality lower today than at the end of the implementation period. This fact alone requires a solution under the Work Programme. However, it should not be forgotten that the purpose of multilateral domestic support disciplines is to prevent a *race to the bottom* which primarily comes at the expense of efficient producers, especially in poor developing countries.

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<sup>23</sup> All countries are entitled to a so-called *de minimis*, product-specific spending threshold not subject to reduction. For developed countries the limit is 5% of agricultural production, while it is 10% for developing countries. As a matter of fact, this threshold grows with the value of production in these countries.

### 3. BALI

In the run-up to the Bali Ministerial, a number of proposals to further the agricultural reform process (AoA-Art.20) were submitted by mostly developing country groups. They aimed at freezing and reducing export subsidies, streamlining tariff-rate quota allocation rules, and at finally delivering on the promise made at the Fifth Ministerial in Hong Kong (November 2005) in respect of cotton. In addition the duty-free quota-free market access for LDC (DFQF), also initiated in 2005, was to be completed, and several other demands were put forward by the poorest WTO Members.

#### *The G33 Proposal*

The G33 proposal in respect of food security turned out to be the most politically controversial issue up to the very end of the Bali Conference. In a nutshell, the G33 had proposed to place in the Green Box the acquisition of foodstuffs for public stockpiles in developing country Members with the objective of supporting low-income or resource-poor producers, including at higher than local market prices.<sup>24</sup> In its submission the G33 basically reiterated its Doha Round negotiating proposal claiming that WTO rules allowed developed countries to continue price distortions with very few limits, while leaving developing countries with too little policy space.<sup>25</sup> The main driver was India which had just raised the minimum producer price for rice and foresaw that this subsidy risked exceeding its Amber Box limit for 2013.<sup>26</sup>

The United States, initially supported by Thailand, took the view that any loosening of price and product support disciplines would run counter to the agricultural reform process initiated in the AoA and which was to be continued under the terms of Article 20 of that agreement and of the Doha Development Agenda. The US also argued that the present Green Box criteria for stockpiles and domestic food aid were sufficient to accommodate food security programmes without market distorting effects. Pakistan, partly supporting the G33 proposal and partly following the US position, maintained that the Indian programmes were in fact a measure belonging to the Amber Box, and that “market price support programs of one country could have a negative effect on the food security of other countries.”<sup>27</sup> More concretely, it took the view that Indian rice exports affected directly the competitive relationship with its own cash crop export, namely basmati rice.

The preparatory process in Geneva had failed to come up even with a “mini-package” for Bali. The risk of yet another WTO negotiation failure sent shock waves to trade ministers throughout the world. On their arrival in Bali, the G33 Ministers expressed “deep disappointment that in the Geneva process members failed to find convergence, despite all the efforts and flexibilities that has been shown by the G-33 and other members.”<sup>28</sup> The *Cairns Group* of agricultural exporters without subsidies showed very limited support to the proposal.<sup>29</sup>

<sup>24</sup> “G-33 Non Paper”, WTO-Documents JOB/AG/25, 3 October 2013, Geneva

<sup>25</sup> For details see the FAO Trade Policy Brief No. 16, The Bali package – implications for trade and food security (February 2014).

<sup>26</sup> Somewhat ironically, the massive devaluation of the Indian Rupee seems to have brought Indian farm support back below the AMS limit just at the time of the Bali Conference.

<sup>27</sup> Plenary Session. Statement by Aisha Moriani on behalf of H.E. Mr Khurram Dastgir KHAN, Minister of State for Commerce and Textile Industry

<sup>28</sup> G-33 Ministerial Communiqué. Bali, 2 December 2013

<sup>29</sup> 38th Cairns Group Ministerial Meeting, Bali. Communiqué dated 2 December, 2013 (“we recognise policies which distort trade and production in agricultural products can impede long term food security”). The Cairns Group also had to accept that its demand for an abolition of export subsidies (applying to developed countries) was for “post Bali”.



After five intensive days in Bali, the ministers finally adopted the most substantive decision in the “Bali package”, the *Agreement on Trade Facilitation*.<sup>30</sup> This success led the United States to lift its objections to the last version of the food security proposal negotiated in parallel ministerial sessions. It also accepted a “constructive ambiguity” regarding the duration of the peace clause.<sup>31</sup> US Trade Representative Michael Froman then “urged Pakistan’s trade minister [...] to support the compromise on food security, emphasizing that it would allow WTO members to reach a deal here and contains sufficient safeguards to protect against trade-distortive impacts of such stockholding programs.”<sup>32</sup> While India had finally accepted this latest proposal, this left Pakistan alone with its concerns about a “rice war”. It was only in the morning hours after the scheduled end of the Conference that a solution was finally found which everybody could live with.

### The Decision

The Ministerial Decision adopted on 7 December 2013, reproduced in Annex 2, exempts from dispute settlement challenges “support provided for traditional staple food crops in pursuance of public stockholding programmes for food security purposes existing as of the date of this Decision” (para. 2). Yet, beneficiaries of this “peace clause” finding themselves at risk of exceeding their Amber Box entitlements have to respect several conditions: besides detailed notification obligations, full reporting and monitoring by the Committee on Agriculture, and acceptance of consultations on request, their programmes must be “consistent with the criteria of paragraph 3, footnote 5, and footnote 5&6 of Annex 2 to the AoA”. Most importantly, paragraph 4 specifies that the beneficiaries of the Decision “shall ensure that stocks procured under such programmes do not distort trade or adversely affect the food security of other Members”.

The Decision calls this an “interim mechanism” and puts in place a Work Programme “to negotiate on an agreement for a permanent solution, for the issue of public stockholding for food security purposes for adoption by the 11th Ministerial Conference” (para 1).

Both India and Pakistan, along with the rest of the WTO Membership, accepted and even praised the Bali Decision on Food Security. Indian Commerce Minister Anand Sharma claimed that “India had achieved its goal of ensuring that its stockholding programs are shielded from challenge indefinitely until a permanent solution is reached to modify WTO rules in a way that reduces the chances India’s programs would breach its limits on trade-distorting subsidies.” Aisha Moriani, economic counselor in Pakistan’s Geneva Mission, welcomed the safeguard provision stating that “[a]ny developing Member seeking coverage of programmes under [the peace clause] shall ensure that stocks procured under such programmes do not distort trade or adversely affect the food security of other Members” and that the work programme set up to find a permanent solution “shall take into account Members’ existing and future submissions.” She also pointed out that the Decision “does not exempt such programs from litigation under the Agreement on Subsidies and Countervailing Measures, under which WTO members have committed not to provide subsidies that cause adverse effects to other members.”<sup>33</sup>

<sup>30</sup> Document WT/MIN(13)/W/8 dated 6 December 2013

<sup>31</sup> “In the interim, until a permanent solution is found” (beginning of para 2)

<sup>32</sup> World Trade Online posted 6 December 2013

<sup>33</sup> *Ibid.* Moriani also suggested that India now had four years to reform its current stockholding policy to pursue other approaches to food security: “[t]his means the work program will consider a wide variety of views. I do find here a space for other perspectives of food security because stockholding is not just the only way of taking care of that; market opening is also important, and many countries are providing cash transfer programs”.

## Interpretation

The Decision leaves unchanged the basic distinction between the Amber and Green Boxes. It reiterates in paragraph 5 that there shall be no increase in Amber Box entitlements for other support programmes.<sup>34</sup> In other words, it does not authorise breaches of the relevant substantive AoA disciplines. It merely provides that such breaches will remain unchallenged under the WTO dispute settlement system. Decision 38 thus appears as an “agreement to disagree” – for the time being.

Significantly, the Decision is silent on the possibility to challenge such programmes under the provisions of the Agreement on Subsidies and Countervailing Measures (SCM).<sup>35</sup> It should be noted that AoA-Article 13 explicitly allows for a screening of agricultural (domestic and export) subsidies under SCM disciplines. The condition that “stocks procured under such programmes do not distort trade or adversely affect the food security of other Members” (para 2) appears to only reflect AoA-language. But more stringently, the SCM agreement prohibits subsidies with a causal injury effect on other countries, including on world market prices, and this might precisely be what Pakistan had in mind when it criticised the G33 proposal.<sup>36</sup>

In my view this decision does provide an excellent opportunity to address the issue of stockpiles as one risk management tool used to increase food security. As it stands, it nevertheless raises a number of important questions.

The first difficulty lies in the condition that food security programmes, in order to benefit from the “peace clause”, must be and must remain consistent with the Green Box criteria. This is puzzling: while any measure by any WTO Member can at all times be challenged under the Dispute Settlement Understanding (DSU), a fully Green Box-consistent measure will not lead to a ruling against the Member pursuing such a food security programme. In itself, a legal challenge has no practical consequences for a country’s WTO commitments. Why then the need for Decision 38?

Secondly, can this decision really prevent an existing food security programme from being challenged? This is definitely what the Ministerial Decision intends to achieve.<sup>37</sup> However, the inherent automaticity of the WTO litigation process implies that only a formal modification of the Dispute Settlement Understanding (DSU) can give legal meaning to this intent. Absent such a modification, the Dispute Settlement Body (DSB) will always establish a panel, upon request by a Member and after the relevant formal consultation and other requirements are met. The question then is whether that panel can and will reject the complainant’s right to bring such a case, and decline to rule on the basis of the Bali Decision, despite its DSB mandate to find a “positive solution”. Could it also do so when a complainant, based on paragraph 4 in the same decision, successfully discharges its burden of proof by invoking trade distortion or an impairment of its own (export-financed) food security? Why does the decision not explicitly allow

<sup>34</sup> “This Decision shall not be used in a manner that results in an increase of the support subject to the Member’s Bound Total AMS or the *de minimis* limits provided under programmes other than those notified under paragraph 3.a.”

<sup>35</sup> The WTO Agreement on Subsidies and Countervailing Measures defines the forms of subsidies, and it disciplines their use as well as the measures countries can take to counter the adverse effects of certain subsidies. This includes the use of dispute settlement procedures. After a Member has determined an adverse effect of subsidised imports on its domestic producers it may apply a *countervailing duty*.

<sup>36</sup> See SCM-Art.1-2 for definitions and Art.5 for Adverse Effects.

<sup>37</sup> “Members shall refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture (AoA).” (para 2)



certain specific food security programmes to exceed the limits of the Amber Box? Besides, claims based on the SCM provisions prohibiting subsidies with a causal injury effect on other countries will at any rate be heard by a trade remedies panel.

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## 4. DISCUSSION

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This is not a classic agricultural topic dividing the WTO membership along the lines of food exporting and importing countries. Perhaps for the first time in a WTO ministerial meeting, a rift between developing countries resulted from a claim for more policy space in the pursuance of a developmental objective. The objectives of increasing food security and of promoting national production and social policies in support of poor consumers are all legitimate. But the multilateral trading system looks at all trade-related policies only from the perspective of the distortions they may create, thereby impairing the benefits of rules and trade concessions negotiated between Members. Food aid and stockpile policies clearly have trade implications. The present rules were designed to minimise trade distortions. They were revisited unsuccessfully under the Doha Development Agenda. Today the basic question is still whether food policies can displace trade and thus fall under the provisions on export competition or trade-distorting subsidies. At first sight, paradoxically, it is precisely the social dimension of food purchases from poor farmers, and subsidised sales to poor consumers which are likely to place such programmes in the Amber Box. In practice, the situation is less clear. Economists may argue that subsistence farmers have no staple food to sell and that prices would be generally lower without import tariffs, or that cheaper food could be made available through food stamps for the poor. The question for public stockpiles is whether their costs should be accommodated in an enlarged Green Box, even when such purchases at the same time improve a country's competitive position (which under present rules causes them to fall under the domestic support disciplines and limits of the Amber Box). Unless and until the work programme finds a solution for this crucial issue, and only if such a solution becomes again challengeable under the DSU, legal uncertainty will prevail and negatively affect food security and trade. This also means that India and other countries will lack clear signals from the WTO on how to reformulate, should they want to do so, their stockpile policies and other measures taken to minimise price volatility.

In the meantime the Bali Decision remains what legal scholars call a *political commitment* rather than a legally binding exemption shielding certain stockpile programmes from legal challenges and rulings under the DSU. Indeed, there are only three ways to amend WTO rules:

1. an *authoritative interpretation* (WTO-Art. IX:2);
2. a *waiver* (WTO-Art. IX:3), or
3. an *amendment* (WTO-Art. X).<sup>38</sup>

Decision 38 starts with the Ministers “*having regard to* paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization” – but that preamble provision merely lays down the procedures for proposing and adopting amendments. It is not clear to me that this *eo ipso* modifies any

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<sup>38</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, Section 2.6. Cambridge University Press, Third Edition 2013.

WTO rules. Besides, as already pointed out, the ministers explicitly refrained from formally modifying any Amber or Green Box provisions.

My own reading of this decision is that this may very well be another version of “creative ambiguity”. Discussions in the General Council and in the next two Ministerials are certain to be difficult. Probably not by coincidence, India was heavily criticised in the first meeting after Bali of the WTO Agriculture Committee (21 March 2014).

- The United States calculated that the cost of India’s food subsidy bill was approximately double the amount it would cost to provide all below poverty households with enough cash to cross the poverty line.
- Pakistan asked numerous questions on India’s expansive rice support programme which might lead to India breaching its AMS ceiling.
- Brazil, Colombia, Australia and the EU all claimed that India’s sugar incentive programme was in fact a WTO-illegal export subsidy.
- Finally, Canada and the US queried India for its 2013 and 2014 wheat exports whereby 3m metric tons were exported well below acquisition costs from public food reserves of 28m metric tons purchased at administered prices.<sup>39</sup>

These queries and criticisms are not formal complaints but they could easily turn into as many litigation cases – yet not one of them would be exempted by the Bali peace clause. It should also be emphasised that in recent years India has turned into a major agricultural exporter, becoming the world’s first exporter of rice and beef, and gaining major market shares in sugar and wheat exports. Under these circumstances Indian food security seems to acquire a different image, not least because it has also been pointed out that many farmers in South and East India have left the food production sector and become reliant on food hand-outs after finding farming no longer profitable.<sup>40</sup>

What is required in the Food Security Work Programme is “creative thinking” on how to make room in the Green Box for more farm support in pursuance of legitimate food security objectives. In particular, the work programme should clarify which types of stockpile schemes outside the present Green Box may be permanently pursued without any WTO limitations and subsidy disciplines. The challenge here will be to ensure that any social policy component by way of “administered prices” would have no or only minimal trade impacts, and not unduly shield domestic producers from more efficient and non-subsidised competitors in other countries. As for that matter, the food aid negotiation in the Doha Round has failed to meet that challenge.<sup>41</sup>

Should this new attempt also fail, the only option would seem to be recourse to the Dispute Settlement Body by a complainant considering that its WTO-enshrined market access rights and/or its own food

<sup>39</sup> WTO Committee on Agriculture, Points raised by Members under the Review Process. Compilation of Questions for the Meeting on 21 March 2014. WTO Secretariat Document G/AG/W/119 dated 11 March 2014

<sup>40</sup> Sally Trethewie, India’s Food Security Bill: A waste or win for the hungry? RSIS Commentaries No. 012/2012. Singapore, 16 January 2012.

<sup>41</sup> For the food security problems of the envisaged “safety box” see Heri and Häberli *op.cit.* (2011)

security are unlawfully impaired. Even then, whether a clarification could be obtained in this way remains an open question after Decision 38.

A well-designed work programme could also lead into a wider discussion on the role of stockpiles in a (national) food security strategy. My starting point is that all stockpiles inevitably incur costs. According to the Food and Agriculture Organization of the United Nations (FAO), these costs are very high.<sup>42</sup> Foreign food aid in grant form, of course, only solves the financial side of the problem from the beneficiary country's perspective. In certain cases, for instance in Ethiopia, such schemes can even have a price depression effect for local farmers.<sup>43</sup> It may be also noted here that the rising world market prices during recent years have unfortunately led to a dramatic decrease of international food aid. Nonetheless, the new Food Assistance Convention concluded on 25 April 2012 offers absolutely no guarantee of a secure provision of food aid.

This article cannot discuss the actual usefulness of stockpiles in stabilising prices. However, as was made clear in Bali, the challenge for the Work Programme will be to agree on a way to better allow stockpiles increasing food security at the national level and through producer support, yet without impairing global food security, competition by efficient farmers, and national food security in other countries. Economists also ask whether stockpiles really reduce the transmission of speculation effects from futures markets to spot markets.<sup>44</sup>

While these are mainly economic debates, three suggestions from a non-economist might nevertheless be in order. Provided the WTO rules are reviewed and, where necessary improved, stockpile schemes could be made cheaper and more efficient in two ways, and food aid supplies should be made more secure. It seems to me that all three measures proposed here would be achievable without adding to the possible negative spill-over effects on world market price stabilisation.

First, public ownership of stockpiles has so many drawbacks that it is surprising nobody seems to question this mode of operation. Alternatives like privately owned and organised reserves under a governmental food security mandate should hence be examined with a view to minimising maintenance costs, corruption, and negative spill-overs on other ways of reducing price volatility. Financing the public interest part under such schemes, however, might require a review of the present WTO rules (e.g. Art.II:1(b) GATT for border levies).

Second, food reserves could be organised more efficiently on a regional level. Poor harvests, local events and, more generally, all cyclical factors affecting food security are often limited to one country or a part of it. Regionally integrated national stockpiles can in such cases mitigate famines, as do the regional food reserves of the World Food Programme (WFP). Such a "virtual" joint operation of food reserves, through sales or loans, would probably reduce price volatility and speculative market behaviour. The biggest problem here, for obvious reasons, is in the conditions under which stock releases would be automatically triggered: a "regional right to food" in sufficient quantities is not available today. There is only one such scheme in operation, the *ASEAN Plus Three Emergency Rice Reserve Agreement*

<sup>42</sup> Cf. FAO, State of Food Insecurity (2013). George Rapsomanikis (FAO), in his presentation at the WTO Public Forum on 3 October 2013, said costs could be up to 15–20% p.a., adding that stockpiles could crowd out public goods.

<sup>43</sup> Christian Häberli, Ethiopia's Food Reserve Policies and Practice. NCCR Trade Regulation Working Paper 2013/2.

<sup>44</sup> Will et al., *op.cit.* p.21

(APTERR) signed on 7 October 2011. It is one of several policy instruments to manage food security risks within the context of effective regional cooperation.<sup>45</sup> It provides for international food stock releases to respond to local emergencies. In practice, however, its functioning has been limited to its voluntary food aid window.<sup>46</sup> Another scheme envisaged by the Economic Community of West African States (ECOWAS) has not yet seen the light of day.<sup>47</sup> There seems to be no reason why international price stabilisation efforts should not work for food when it exists for energy: under the Convention of 18 November 1974 establishing the International Energy Agency (IEA) member states are committed to jointly conducting data collection, and to a coordinated and at least partial release of reserves in emergency situations. Hence, a Bali follow-up work programme should also look into the WTO rules applying to such “virtual” schemes of regional solidarity, especially for transfers below market rates potentially qualifying as export subsidies.

Finally I see a need, and a limited opportunity, to review the WTO rules on *export restrictions*. It is a fact that most governments are simply not prepared today to accept enforceable disciplines beyond the present weak rules, in particular Art.XI:2 of the GATT. However, export prohibitions as well as export taxes and quotas were a major cause of the food crisis and of price volatility.<sup>48</sup> The double victims in the net food-importing developing countries (NFIDC) were consumers hit by skyrocketing prices and small farmers lacking response capacity to increase food production. In my opinion, if the NFIDC get their act and courage together and unanimously call for remedial action in the WTO, developed and developing country exporters would have to address the issue and at least find ways to prevent starvation. As a minimum, food aid purchases by the WFP should be allowed without any export restrictions.<sup>49</sup>

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## 5. CONCLUSIONS

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Trade-distorting domestic support under WTO rules is a case of an unfinished job, just like for market access (*tariff overhang*) and for export subsidies which are only available to some countries. The situation for domestic subsidies reflects a negotiated but unbalanced outcome of the Uruguay Round. The failure of the Doha Round to create a level-playing field for trade in agriculture exacerbates the “export bias” of WTO rules relevant for food security. Admittedly, *de minimis* subsidy limits are higher for developing countries (10% of agricultural production, and 5% for developed countries). But in addition to those limits, 30 Members with high historic support levels – record-keepers are all European countries – are still able to protect their own producers from competition, to distort world market prices and to depress farm revenues in food importing developing countries.

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<sup>45</sup> Roehlano M. Briones, Regional Cooperation for Food Security: The Case of Emergency Rice Reserves in the ASEAN Plus Three. ADB Sustainable Development Working Paper Series No. 18 (November 2011)

<sup>46</sup> Sally Trethewie, The ASEAN Plus Three Emergency Rice Reserve (APTERR): Cooperation, commitment and contradictions (NTS Working Paper no. 8, Singapore: RSIS Centre for Non-Traditional Security (NTS) Studies (2013)

<sup>47</sup> UNCTAD, The Potential Establishment of Emergency Food Reserve Funds (Discussion paper 3 written by Thomas Lines, November 2011)

<sup>48</sup> Martin and Anderson *op.cit.* (2011)

<sup>49</sup> In the Doha Round, in dispute settlement and on other occasions it became apparent that this issue cannot be solved in isolation. The decisions made on food export restrictions by the G20 Summits in Cannes (2011) and in Los Cabos (2012) to at least exempt WFP and other non-commercial food purchases from export restrictions and prohibitions have never made it to a WTO Ministerial agenda. The last G20 Summit in St. Petersburg (5–6 September 2013) conveniently forgot to even refer to this matter.

This being, after the Bali Conference the UN-enshrined Right to Food and the WTO concept of food security are at an even higher risk of being definitely understood as farmers' security. The consequences of such a fatal equation would not be less price volatility and more secure food. On the contrary, more policy space for farm support may well result in efficiency losses coming at the expense of poor consumers, and of efficient farmers in other developing countries, without the benefit of guaranteed prices. Only apparently better would be a notion of *small farm security*. Indeed, many small farmers are simply less productive than big ones. Unless the numerous anti-small farm policy biases are removed, subsistence farmers and nomads will not feed themselves, let alone the world. Besides, they are not obviously more climate change-resilient than big farms. For the sake of global food security, WTO must therefore continue to act as a bulwark against agricultural policies affording protection at the expense of other farmers.

Food security does not represent an unqualified case for the abolition of border protection and of all forms of non-Green Box support. The present lack of trust in the multilateral trading system prevents a resolute march towards free trade. Food insecurity leads some governments to increase inefficient food production. In addition, regional trade and investment agreements will not solve the complex issues of domestic support and export restrictions.

The WTO rules framework – rightly or wrongly – is not about objectives, only about tools. It is not about good policies, only about distinguishing between protection and protectionism. This distinction will only be tested when a Member brings a case. For food security and without a successful outcome of the Work Programme the spill-over effects of domestic support on (poor) farmers in other countries are likely to grow. The Bali Decision compounds this danger by allowing developing country stockpiles to operate without the possibility of a legal challenge. The good news is that “Bali” also showed, perhaps for the first time, that for South–South issues such as food reserve management, developing country negotiating groups no longer act in a kind of automatic solidarity mode. The solution for food security and stockpiles might now be found for countries without the size and the means to distort world trade. The (negotiated and subject to review) list of NFIDC could provide a starting point here, provided other developing countries show sufficient political will to offer their most vulnerable brethren some more policy space.

The proof of the pudding lies in the eating. The Work Programme established by the WTO Ministers will have to cut the Gordian knot between “true” food security reserves and the “no or at most minimal” trade distortions allowed by the Green Box. Whether and what rules might need to be changed remains to be seen. In addition, three avenues for food reserve policies are suggested here where minor rules changes are required and where progress seems possible even in the absence of a larger negotiating package: market access rules allowing for alternative stockpile financing, AoA-compatible regional and virtual food reserves, and a small window allowing food aid purchases in case of export restrictions. The goal remains the same, with or without a change of the rules, namely to allow competitive farmers to feed the world.

## Annex 1

# Agreement on Agriculture

## Annex 2

### DOMESTIC SUPPORT: THE BASIS FOR EXEMPTION FROM THE REDUCTION COMMITMENTS

1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

- (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
- (b) the support in question shall not have the effect of providing price support to producers;

plus policy-specific criteria and conditions as set out below.

[...]

3. Public stockholding for food security purposes<sup>1</sup> Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme.

The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.

4. Domestic food aid<sup>2</sup>

Expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need.

Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.

<sup>1</sup> For the purposes of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS.

<sup>2</sup> For the purposes of paragraphs 3 and 4 of this Annex, the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.



**Ministerial Conference  
Ninth Session  
Bali, 3-6 December 2013**

## **PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES**

### **MINISTERIAL DECISION OF 7 DECEMBER 2013**

The Ministerial Conference,

*Having regard* to paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization;

*Decides* as follows:

1. Members agree to put in place an interim mechanism as set out below, and to negotiate on an agreement for a permanent solution<sup>1</sup>, for the issue of public stockholding for food security purposes for adoption by the 11<sup>th</sup> Ministerial Conference.
2. In the interim, until a permanent solution is found, and provided that the conditions set out below are met, Members shall refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops<sup>2</sup> in pursuance of public stockholding programmes for food security purposes existing as of the date of this Decision, that are consistent with the criteria of paragraph 3, footnote 5, and footnote 5&6 of Annex 2 to the AoA when the developing Member complies with the terms of this Decision.<sup>3</sup>

### **NOTIFICATION AND TRANSPARENCY**

1. A developing Member benefiting from this Decision must:
  - a. have notified the Committee on Agriculture that it is exceeding or is at risk of exceeding either or both of its Aggregate Measurement of Support (AMS) limits (the Member's Bound Total AMS or the *de minimis* level) as result of its programmes mentioned above;
  - b. have fulfilled and continue to fulfil its domestic support notification requirements under the AoA in accordance with document G/AG/2 of 30 June 1995, as specified in the Annex;
  - c. have provided, and continue to provide on an annual basis, additional information by completing the template contained in the Annex, for each public stockholding programme that it maintains for food security purposes; and
  - d. provide any additional relevant statistical information described in the Statistical Appendix to the Annex as soon as possible after it becomes available, as well as any information updating or correcting any information earlier submitted.

<sup>1</sup> The permanent solution will be applicable to all developing Members.

<sup>2</sup> This term refers to primary agricultural products that are predominant staples in the traditional diet of a developing Member.

<sup>3</sup> This Decision does not preclude developing Members from introducing programmes of public stockholding for food security purposes in accordance with the relevant provisions of the Agreement on Agriculture.



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**ANTI-CIRCUMVENTION/SAFEGUARDS**

4. Any developing Member seeking coverage of programmes under paragraph 2 shall ensure that stocks procured under such programmes do not distort trade or adversely affect the food security of other Members.

5. This Decision shall not be used in a manner that results in an increase of the support subject to the Member's Bound Total AMS or the de minimis limits provided under programmes other than those notified under paragraph 3.a.

**CONSULTATIONS**

6. A developing Member benefiting from this Decision shall upon request hold consultations with other Members on the operation of its public stockholding programmes notified under paragraph 3.a.

**MONITORING**

7. The Committee on Agriculture shall monitor the information submitted under this Decision.

**WORK PROGRAMME**

8. Members agree to establish a work programme to be undertaken in the Committee on Agriculture to pursue this issue with the aim of making recommendations for a permanent solution. This work programme shall take into account Members' existing and future submissions.

9. In the context of the broader post-Bali agenda, Members commit to the work programme mentioned in the previous paragraph with the aim of concluding it no later than the 11th Ministerial Conference.

10. The General Council shall report to the 10th Ministerial Conference for an evaluation of the operation of this Decision, particularly on the progress made on the work programme.

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## ANNEX

## Template

[Developing Member's name]

## General information

1.	Factual information confirming that DS:1 notifications and relevant supporting tables for the preceding 5 years are up-to-date (e.g. date and document details)
2.	Details of the programme sufficient to identify food security objective and scale of the programme, including:
	a. Name of the programme
	b. Traditional staple food crop(s) covered
	c. Agency in charge of implementation
	d. Relevant laws and regulations
	e. Date of commencement of the programme
	f. Officially published objective criteria or guidelines
3.	Practical description of how the programme operates, including:
	a. Provisions relating to the purchase of stocks, including the way the administered acquisition price is determined
	b. Provisions related to volume and accumulation of stocks, including any provisions related to pre-determined targets and quantitative limits
	c. Provisions related to the release of stocks, including the determination of the release price and targeting (eligibility to receive procured stocks)
4.	A description of any measures aimed at minimising production or trade distortive effects of the programme
5.	Statistical information (as per the Statistical Appendix below)
6.	Any other information considered relevant, including website references

Statistical Appendix (per crop) (data for the latest three years)

	Unit	[Year 1]	[Year 2]	[Year 3]
<b>[Name of the crop]</b>				
a. Opening balance of stocks				
b. Annual purchases under the programme (value)				
c. Annual purchases under the programme (quantity)				
d. Annual releases under the programme (value)				
e. Annual releases under the programme (quantity)				
f. Purchase prices				
g. Release prices				
h. End-year stocks				
i. Total production (quantity)				
j. Total production (value)				
k. Information on population benefiting from the release of this crop and quantities released:				
- Estimated number of beneficiaries at national level and, if possible, at sub-national level				
- Quantity released to the beneficiaries at the national level and, if possible, at the sub-national level				
- Other				
l. In the case of government aid to private storage, statistics on the support granted and any updated statistics				
m. Total imports (value)				
n. Total imports (quantity)				
o. Total exports (value)				
p. Total exports (quantity)				

